

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

MARTIN J. WALSH, SECRETARY OF
LABOR, UNITED STATES
DEPARTMENT OF LABOR,

Plaintiff,

v.

MEDICAL STAFFING OF AMERICA,
LLC, etc., et al.,

Defendants.

CIVIL ACTION NO.
2:18cv226

TRANSCRIPT OF PROCEEDINGS

**** Bench Trial - Day 7 ****

Norfolk, Virginia

September 9, 2021

BEFORE: THE HONORABLE RAYMOND A. JACKSON
United States District Judge

APPEARANCES:

UNITED STATES DEPARTMENT OF LABOR
By: Ryma N. Lewis
Chervonti Jones
Mohamed E. Seifeldein
Counsel for the Plaintiff

PIERCE McCOY, PLLC
By: Joshua L. Jewett
Julia A. Rust
Aaron D. Siegrist
Counsel for the Defendants

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—J. Bredehoft - Direct—

1 (Proceedings resumed at 10:02 a.m.)

2 THE COURT: Good morning, ladies and gentlemen. We
3 are ready to commence with the next witness from the
4 defendants.

5 MS. RUST: Your Honor, the defendants call John
6 Bredehoft.

7 THE COURT: All right. Step forward to be sworn.

8 MR. JEWETT: Your Honor, within the stands with us
9 is Mr. Pat O'Donnell from Mr. Bredehoft's law firm.

10 THE COURT: Will he be testifying in this case?

11 MR. JEWETT: He is not. He is here attending with
12 Mr. Bredehoft.

13 THE COURT: All right. Thank you.

14 (Witness sworn.)

15 JOHN BREDEHOFT, called by the Defendants, having
16 been first duly sworn, was examined and testified as follows:

17 DIRECT EXAMINATION

18 BY MR. JEWETT:

19 Q. Good morning, Mr. Bredehoft.

20 A. Good morning, Counsel.

21 Q. Could you please state your name and spell your last name
22 for the court reporter.

23 A. Of course. My name is John Michael Bredehoft,
24 B-r-e-d-e-h-o-f-t.

25 Q. Thank you.

—J. Bredehoft - Direct—

1 Are you familiar with Lisa Pitts?

2 A. Yes, I am.

3 Q. How is that?

4 A. I and my firm represented her for a while in matters
5 against the U.S. Department of Labor.

6 Q. Okay. Before I get into that, I would like to ask you a
7 few background questions.

8 A. Sure.

9 Q. In what states are you licensed to practice law?

10 A. I am admitted to practice in Virginia, the District of
11 Columbia, and the state of Maryland and a number of federal
12 courts.

13 Q. Did you read for the Bar, or did you graduate from law
14 school?

15 A. No. I graduated from law school.

16 Q. Your law school and your year of graduation?

17 A. I graduated in 1983 cum laude from Harvard.

18 Q. You graduated in 1983.

19 About how long have you been practicing law?

20 A. I began practicing immediately thereafter, upon my
21 admission to the Bar. I worked with the firm in a nonlegal
22 capacity until Bar results came out in December, in D.C., and
23 I've been practicing continuously ever since.

24 Q. And have you practiced in the area of labor and
25 employment during the course of your career?

—J. Bredehoft - Direct—

1 A. Yes, I have.

2 Q. In how many of those years have you practiced in the area
3 of labor and employment law?

4 A. It has formed the predominant part of my practice since
5 approximately 1984, although I did do labor and employment
6 matters before that. I'm sorry, 1994.

7 Q. My acoustics aren't very good right here. Could I ask
8 you to get a little bit closer to the microphone.

9 A. Is this better?

10 Q. That's better. Thank you. I appreciate it.

11 Your current position?

12 A. I'm an equity member of the law firm of Kaufman & Canoles
13 in Norfolk.

14 Q. Back to your practice experience, does your practice
15 experience include representing and advising clients on the
16 Fair Labor Standards Act?

17 A. Yes, it does.

18 Q. Have you previously advised companies regarding the
19 classifications of workers as independent contractors under
20 the Fair Labor Standards Act?

21 A. Yes, I have.

22 Q. About how many?

23 A. I would be unable even to estimate. I believe it would
24 be at least scores. I don't want to say it was hundreds, but
25 it might be.

—J. Bredehoft - Direct—

1 Q. Okay. And have you also represented medical registries
2 in matters adverse to the Department of Labor?

3 A. I have represented medical staffing agencies in matters
4 adverse to the Department of Labor. I have also represented
5 medical registries in matters where the Department of Labor
6 was not adverse.

7 Q. You make a distinction between medical staffing companies
8 and medical registries. What is that distinction?

9 A. What I call "medical staffing companies" hire nurses and
10 then place the nurses, and in that case, the nurses are
11 employees of the staffing company. Registries merely set up
12 a matching service to allow nursing homes, hospitals, other
13 facilities to be matched with nurses who are willing to work
14 there.

15 Q. Okay. And just following up on that, in your experience,
16 are medical registries -- the nurses who accept positions out
17 of medical registries, are they typically classified as
18 independent contractors?

19 MS. LEWIS: Objection, Your Honor. Calls for a
20 legal conclusion.

21 MR. JEWETT: Your Honor, Rule 701 allows the witness
22 to --

23 THE COURT: Well, are you calling him as an expert,
24 or are you calling him as a lawyer for the defendants?

25 MR. JEWETT: Well, 701 does accept from Rule 702

—J. Bredehoft - Direct—

1 certain opinions as long as it's based on --

2 THE COURT: Sustained.

3 MR. JEWETT: Okay.

4 BY MR. JEWETT:

5 Q. So let me back up.

6 You said that you have experience representing and
7 advising companies on independent contractor questions.

8 Are you familiar with the economic realities test,
9 sometimes referred to as the *Silk* test?

10 A. Yes.

11 Q. Going back to Ms. Pitts, how is it that you came to
12 represent Ms. Pitts?

13 A. An attorney in our firm was asked by a judge in Virginia
14 Beach, I believe a state court judge, to see if we could
15 assist Ms. Pitts. And that attorney called me. I called
16 Ms. Pitts. We met, and we accepted representation.

17 Q. When did you start representing Ms. Pitts?

18 A. I don't know the date the engagement letter was signed,
19 but I believe my first meeting with Ms. Pitts occurred about
20 June 15, 2018.

21 Q. Okay. Before I get to that first meeting, did you meet
22 with Ms. Pitts -- your first meeting was around June 15th.

23 Did you meet with Ms. Pitts on multiple occasions
24 following that meeting?

25 A. I am not sure -- pardon me, Your Honor. May I move the

—J. Bredehoft - Direct—

1 chair? My wife gave me a new hip for Christmas, and it's not
2 fully unwrapped.

3 Thank you.

4 I know I met with Ms. Pitts in January of 2019,
5 probably in the third week. I can't exclude the possibility
6 that we met physically other than those two times, but I
7 don't remember it. It would have been in the context of
8 gathering documents to respond to discovery.

9 Q. Okay. Let's go back to the first meeting.

10 Was this first meeting in person or over the phone?

11 A. It was in person.

12 Q. Okay. And about how long did it last?

13 A. My best recollection is it lasted more than an hour,
14 perhaps up to two hours, but perhaps not.

15 Q. Okay. And did you obtain any information from Ms. Pitts
16 about her company during that meeting?

17 A. Yes. We met at the offices of her general corporate
18 lawyer, Wanda Cooper, who was also present, and Ms. Pitts
19 described for me the operations of Steadfast. I asked
20 questions, and we talked back and forth about how it worked.

21 Q. Okay. And based on -- well, let me ask you this:

22 Can you give the Court some more details about the
23 operations that she provided to you -- strike that.

24 Can you give the Court more details about what she
25 informed you about the operations of her company during that

—J. Bredehoft - Direct—

1 first meeting?

2 A. Sure.

3 During that first meeting, we discussed the
4 differences between a staffing agency and a registry. We
5 discussed where her individual nurses would match themselves
6 with where -- I mean physically, geographically, in
7 facilities, how someone would get on the registry, what
8 Steadfast did for people who were on the registry, any
9 expenses that Steadfast assumed for people who were on the
10 registry, anything that Steadfast provided for people who
11 were on the registry, and restrictions or mandates regarding
12 how often they needed to work, whether they needed to call in
13 if they were going to be sick, whether they needed to call in
14 if they were taking vacation.

15 That is the general parameter of the things that we
16 discussed at the first meeting regarding the working
17 conditions. We also discussed what documents existed, what
18 discovery would be possible. And we did discuss the nature
19 of the economic realities test.

20 Q. In that first meeting, did you walk through the factors
21 of the economic realities test with Ms. Pitts?

22 A. Well, we didn't walk through the seven factors that are
23 set out in the Department of Labor's Publication 13. We did
24 talk about a number of the factors that are in the
25 publication. We didn't go through them seriatim.

—J. Bredehoft - Direct—

1 Can I say this? I'm not sure, Your Honor.

2 In my experience, the most important factor has been
3 a particular factor.

4 MS. LEWIS: Your Honor, objection with respect to --

5 THE COURT: I'm going to overrule it. He can tell
6 us what he discussed with her. He can certainly do that.

7 THE WITNESS: Thank you, Your Honor.

8 I did tell Ms. Pitts that, in my experience, the
9 most important factor of the economic realities test, as set
10 out in Fact Sheet 13, was the fourth factor, which is the
11 degree of power or control that the entity exercises over the
12 performance of the job.

13 We also talked about scheduling, which is relevant
14 to one of the other factors, I think the second factor,
15 permanence. And we talked about what the expenses were for a
16 nurse on the registry who assumed those -- the fact that
17 Steadfast did not assume any of those expenses, except for
18 paying for a background check, which goes to at least two of
19 the other factors on that list.

20 BY MR. JEWETT:

21 Q. Okay. Did you discuss classification of the nurses in
22 Steadfast's registry during this initial meeting with
23 Ms. Pitts?

24 THE COURT: Mr. Jewett, you need to let him tell us
25 what he discussed. The Court doesn't want you to lead him

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1 through some of the essential factors or issues. Let him
2 tell us what he discussed. In other words, that question, in
3 its own way, is a leading question and is something that the
4 Court is concerned about. So you let him tell us what he's
5 discussed. So far he's done a good job of telling you what
6 he discussed.

7 MR. JEWETT: Your Honor, may I ask Mr. Bredehoft if
8 he discussed the classification question with Ms. Pitts in
9 this first meeting?

10 THE COURT: All right.

11 MR. JEWETT: Thank you.

12 BY MR. JEWETT:

13 Q. Did you discuss the classification question with
14 Ms. Pitts during this initial meeting?

15 A. Absolutely. That's why I was there.

16 Q. And what did you tell Ms. Pitts about that?

17 A. Well, this was only on a brief acquaintance, but we
18 discussed at the first meeting, I remember, the fact that --
19 any of these facts are coming to me. I don't know them of my
20 own -- but the fact that the individuals could call in or not
21 as their own decision and that there were no negative
22 consequences to any individual deciding not to call in or not
23 to work.

24 We discussed that individuals did not need to get
25 permission for taking a break, that some individuals -- I

—J. Bredehoft - Direct—

1 remember this clearly from both of our meetings -- some
2 individual nurses would call in once or twice, then not for a
3 couple of years, and then call in again after a couple of
4 years with no negative consequences.

5 We discussed that several nurses -- I don't know how
6 many, and I don't think we discussed that at the first
7 meeting -- that nurses would work for two or three weeks and
8 then take off for two or three weeks, or work a week on, a
9 week off, and again, there was no negative consequence to any
10 of the scheduling.

11 We discussed that there were no restrictions, I was
12 told at the first meeting, on any of the nurses working for a
13 facility outside the registry, not going through it, or from
14 working through another registry even at the same facility,
15 and that that was a not-uncommon occurrence, that nurses
16 would be registered with several different registries, work
17 through them at their disposal, at their own choice.

18 We discussed the fact that the nurses knew that,
19 that they had the ability to work at other facilities or
20 through other staffing agencies, because they frequently did
21 so, without negative consequence.

22 And at the first meeting --

23 THE COURT: Well, I think you might want to stop
24 there and see where he goes next with his questions.

25 THE WITNESS: Very good, Your Honor.

—J. Bredehoft - Direct—

1 BY MR. JEWETT:

2 Q. Did you provide Ms. Pitts an opinion in that first
3 meeting about whether the nurses appeared to be classified
4 correctly?

5 A. I did not provide a formal legal opinion, and she didn't
6 ask me if they were properly qualified. I did, however, say
7 that it appeared to me that they were properly qualified
8 based on the information I had been provided so far.

9 Q. You mentioned that you had a second meeting with Pitts, I
10 think, did you say January 2019?

11 A. I believe it is the third week of January.

12 Q. Before I get into what you advised Ms. Pitts in that
13 meeting, I want to ask you a few questions about what
14 information you had at your disposal heading into that
15 meeting.

16 Well, actually, let me ask you this:

17 That second meeting you had with Ms. Pitts, about
18 how long was it, and was it in person?

19 A. It was in person. It was several hours. It was not only
20 to meet with her and discuss the case in general, but also to
21 prepare her for her deposition.

22 We also prepared one of her employees for her
23 deposition during those meetings, and I believe Ms. Pitts may
24 have sat in on that. It was a number of hours, half a day,
25 perhaps more.

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1 Q. So prior to that meeting, had you obtained any additional
2 information about Steadfast before that meeting?

3 A. Yes. We were engaging in responding to discovery, and we
4 had received, and I had reviewed, a large number of the
5 agreements between Steadfast and the nurses on the registry.
6 I have also received and, I believe, reviewed all of the
7 agreements between Steadfast and healthcare providers, such
8 as hospitals. I believe I reviewed all of those.

9 We had also received a large number of invoices and
10 transactional documents. I have to say, I reviewed what I
11 believed to be a representative sample of those, but I
12 certainly did not review all of the invoices personally.

13 Q. You said that you reviewed a number of facility
14 contracts. Are you aware that some of those facility
15 contracts included a buyout clause?

16 A. Yes.

17 Q. Did the fact that some of those contracts contained a
18 buyout clause -- did that give you concern about the
19 classification status of the nurses?

20 A. No.

21 Q. Why is that?

22 A. Because -- well, for a number of reasons. First, I had
23 previously seen agreements from other registries as well as
24 from staffing agencies that contained buyout clauses.
25 Second, it really doesn't go to any of the seven factors in

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1 the Department of Labor Wage and Hour Fact Sheet 13, which is
2 the Department's analysis of how to interpret the economic
3 realities test.

4 The Department says, and I agree, the economic
5 realities test is really about whether this individual is
6 dependent for the entity on their livelihood. In this
7 registry circumstance, the nurse is not, and the buyout
8 clause doesn't change that.

9 Q. Okay.

10 MS. LEWIS: Your Honor, I'm going to object to some
11 of this line of questioning. If Mr. Bredehoft is here to
12 testify with respect to the legal advice and opinions he gave
13 Ms. Pitts, I think that that is perfectly permissible, but he
14 hasn't been presented as an expert, and much of this
15 commentary that he's providing is outside of the scope of
16 what information he gave her and based upon that information
17 she relied upon.

18 MR. JEWETT: Your Honor --

19 THE COURT: Wait a minute, before you say anything.

20 I heard what he said. He can testify to what he
21 told her about the buyout clause, but all the analysis of why
22 he told her, the Court will sustain that. I mean, he can
23 tell us what he told her. He told her there's no problem
24 with the buyout clause, in his opinion, and other things.
25 But the Court doesn't need your analysis of the opinion of

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1 whether that is, in fact, correct or not. The Court will
2 determine that itself.

3 MR. JEWETT: Of course, Your Honor. If I can just
4 respond with one brief comment. We do have the burden of
5 proof, of course.

6 THE COURT: I know you have the burden of proof.

7 MR. JEWETT: One of the categories is that we have
8 to show that Mr. Bredehoft had a reasonable basis for giving
9 the opinion, which is why we're getting into this "why"
10 question, the basis for his opinion.

11 MS. LEWIS: Your Honor --

12 MR. JEWETT: That's one of the two prongs for the
13 good-faith defense.

14 MS. LEWIS: Right, Your Honor, but the reasonable
15 basis is not -- it's information that Ms. Pitts provided him
16 and that he relied upon in giving that advice. This
17 additional commentary goes to -- as the Court noted, the
18 Court's purpose in here is to make that determination.

19 He testified with respect to his credentials. We
20 know he's been an attorney who has practiced for a number of
21 years in this area. Much of his commentary goes beyond that.
22 He testified that he was provided documents, he reviewed
23 that, and based upon that, "X is my opinion."

24 The Secretary maintains that that is appropriate,
25 but there's been -- more so, he's relying on additional

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1 documents and information that haven't even been presented
2 into evidence.

3 THE COURT: He provided us the basis for his opinion
4 based upon the information she provided. He said he reviewed
5 the contract. He found those buyout agreements to be proper,
6 based on having seen them other places, but what I'm saying
7 is I really do not need his legal analysis.

8 MR. JEWETT: Understood, Your Honor. Thank you.

9 THE COURT: All right. And I think, in terms of
10 your burden to show the reasonable basis, reasonable basis is
11 he said he reviewed the contract. He's seen that before, so
12 he gave her advice. Nothing wrong with the buyout
13 agreements.

14 BY MR. JEWETT:

15 Q. Okay. Mr. Bredehoft --

16 A. Your Honor, may I clarify?

17 THE COURT: Not unless he asks you a question.

18 THE WITNESS: Very good, sir.

19 BY MR. JEWETT:

20 Q. We were talking about the documents you reviewed, the
21 buyout clause.

22 Did Ms. Pitts, during that meeting, provide you any
23 additional information about the scheduling for nurses?

24 A. The answer to that is yes. We talked -- it was not new
25 information, by and large, but we confirmed that the nurses

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1 themselves had full autonomy as to whether or not they would
2 be scheduled, that there were no negative consequences --

3 (Brief interruption.)

4 THE WITNESS: Thank you very much. I'm COVID
5 negative, but I am allergic to everything. Pardon me.

6 We discussed that there would be no negative
7 consequences to any of the nurses for not calling. We
8 discussed a particular circumstance in which a nurse would go
9 to -- sign up for and go to a facility and then leave sick
10 and whether there would be any negative consequences to the
11 nurse for that, and I was told no.

12 We also discussed a particular instance -- and these
13 were not given instances, these were examples -- where a
14 nurse would say, yes, they were going to the facility and
15 they did not go, and I was told that, in that case, Steadfast
16 would merely attempt to match someone else on the registry,
17 and there were no negative consequences to the nurse who
18 didn't show, at least not from Steadfast.

19 And I think that is all the additional information
20 that I was provided regarding scheduling during the second
21 meeting.

22 Q. I think you touched on this briefly when you were
23 answering my question, but did you discuss with Ms. Pitts the
24 nature in which nurses would take time off from the registry,
25 such as a vacation or --

—J. Bredehoft - Direct—

1 A. Oh, yes. We discussed that at the first meeting and at
2 the second meeting. The discussion at the second meeting was
3 consistent with the discussion of the first meeting. It
4 wasn't new information. It was just that a nurse would take
5 a vacation by not calling in. There was no need to get
6 permission from Steadfast or even to apprise Steadfast that
7 the nurse would not be calling in; same thing for sick days.

8 That information was provided to me by Ms. Pitts and
9 also by Christine Kim at the second meeting, who was
10 essentially the office manager, but that was consistent with
11 what I had heard at the first meeting. It wasn't new
12 information.

13 Q. Did you discuss with Ms. Pitts how the nurses were
14 actually paid?

15 A. Yes, I did.

16 Q. So based on the information you discussed with Ms. Pitts
17 at this second meeting, did you evaluate the economic
18 realities of the situation at the second meeting?

19 A. Yes, I did. There was a substantial additional
20 information that we discussed at the second meeting that also
21 came into my evaluation; but, yes, we discussed where the
22 economic realities test, as interpreted through the
23 Department of Labor Fact Sheet 13, would come out.

24 Q. Did Ms. Pitts ask you during that meeting what factors
25 you thought were important?

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1 A. I believe I stated the factors which I thought were most
2 important. I do not believe she asked me the question "Which
3 factors do you think are most important?"

4 Q. Did you convey to Ms. Pitts at the second meeting your
5 assessment of the control factor? You mentioned that
6 earlier, the control factor.

7 A. Yes, I did.

8 MS. LEWIS: Your Honor, I'm going to, again, object
9 to this. He's already answered and provided his opinion
10 about what is most important, but that is not what is
11 controlling here; it's the law and the Court's determination.

12 Moreover, the law is very clear. No one factor is
13 dispositive, and we keep coming back to the same line of
14 questioning seeking to elicit a legal analysis or conclusion
15 with respect to the same.

16 MR. JEWETT: I asked Mr. Bredehoft what he conveyed
17 to her in the first meeting, and I'm asking what he conveyed
18 to her in the second meeting. I think what he advised her in
19 the meetings is important.

20 THE COURT: Well, I think what you're doing is
21 you're leading him into the potential elements or issues.
22 That's what you're doing. He said he discussed the economic
23 realities test with her, and he went through a series when he
24 first started testifying. I think he laid out what he
25 considered to be most important. He's done that.

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1 So your question, in its own way, leads him through
2 some things he has not raised. But let's put it this way:

3 This is not a jury trial. This is a bench trial,
4 and the Court can understand exactly what is happening with
5 respect to your questions, whether you are, in fact, leading
6 him or not. So I'm going to let you ask him that question,
7 but just be aware about the way you phrase the question. I
8 think he's been very clear about what he discussed on each
9 occasion.

10 MR. JEWETT: Thank you, Your Honor.

11 BY MR. JEWETT:

12 Q. So, Mr. Bredehoft, in the second meeting with Ms. Pitts,
13 did you convey to her your assessment based on the
14 information she provided you of the control factor?

15 A. Yes, I did.

16 Q. And what did you tell her?

17 A. I told her -- and this is something I actually said to
18 her, Your Honor. I hope I'm not transgressing -- but that in
19 my reading of the law, the control factor was the most
20 important factor. And, here, Steadfast exercised no control
21 over the manner in which the nurses perform their tasks.

22 It did not have the ability to discipline them. It
23 did not have the ability to initiate any type of progressive
24 proceeding against them. It did not exert a quality control
25 function over them. It did not review -- and this is all

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1 what I said to her -- it did not review their work to see if
2 it was acceptable for nursing or if improvements could be
3 made, and that all of that combined with the scheduling
4 issues and, in particular, the fact that they could work for
5 other staffing companies made it seem to me that the control
6 factor here -- and I did use this term -- would be
7 "dispositive."

8 Q. Did you discuss with Ms. Pitts during that second meeting
9 the degree of skill required of the nurses?

10 A. We discussed whether there was anything extraordinary or
11 different about -- I asked anything extraordinary or
12 different about the degree of skill required, and I believe
13 the response was, no, because once they have the licensure
14 and have met the requirements of the Board of Nursing,
15 Steadfast doesn't delve further into that.

16 Q. Okay. Did you discuss with Ms. Pitts your assessment of
17 the permanence factor in that second meeting?

18 A. Yes, I did.

19 Q. What did you tell her?

20 A. I told her that I thought the fact that certain
21 individuals on the registry could call in and then not call
22 in for two years and still be matched on the registry of the
23 second call --in without any negative implication indicated
24 that there -- at least with respect to the structure of the
25 organization, there was not the degree of permanence that is

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1 usually found in employment relationships.

2 Q. I just want to ask you about two more of the factors and
3 whether you discussed those with Ms. Pitts.

4 You are familiar with a profit-and-loss factor?

5 A. Yes, I am.

6 Q. Did you discuss that with her?

7 A. Only in passing, and it didn't perform -- it didn't
8 affect my analysis much. We discussed that the company paid
9 virtually none of the expenses and that any expenses incurred
10 in getting ready to work, such as licensure itself and the
11 tuberculosis test, which is required, I believe by the
12 Department of Nursing in Virginia, and the CPR certification,
13 which, I believe, is required by Nursing, that was all on the
14 dime of the nurse who wants to be on the registry.

15 So while I didn't think -- I told her I didn't think
16 that was an important factor, I thought that, to the extent
17 it existed, it was probably in her favor.

18 Q. I think the last question on the factors and whether you
19 talked to Ms. Pitts about it in the second meeting is:

20 Are you familiar with the factor of whether the work
21 is integral to the business?

22 A. Yes.

23 Q. Did you discuss that factor with Ms. Pitts during that
24 meeting?

25 A. Yes, we did. And although I didn't use the term

—J. Bredehoft - Direct—

1 "integral," we actually discussed it during the first meeting
2 as well.

3 There are individuals whose work is integral to the
4 business of the registry. Those are the call-in center
5 people, the office manager. They are all employees because
6 their work is integral.

7 But the staffing agency in other cases and the
8 registry in this case does not nurse. The work that is being
9 performed is nursing. And the individuals who are on the
10 registry are nursing. I mean, that's not the business of
11 this company.

12 Q. All right. Based on the information Ms. Pitts provided
13 you, did you provide an assessment during that meeting about
14 whether, in your judgment, the workers should be classified
15 as independent contractors?

16 A. Yes, I did.

17 Q. And what did you inform Ms. Pitts?

18 A. I informed her to a very high degree of confidence that,
19 in my view, they were independent contractors, and I told her
20 that, in my view, she had a very good or excellent chance of
21 prevailing on the issue, if it should be challenged all the
22 way to trial. And I remember using the word "excellent"
23 chance.

24 MR. JEWETT: No further questions. Thank you. And,
25 of course, the Department may have some questions for you.

~~J. Bredehoft - Cross~~

1 THE COURT: Cross-examination.

2 MR. SEIFELDEIN: Thank you, Your Honor. Good
3 morning, Your Honor.

4 CROSS-EXAMINATION

5 BY MR. SEIFELDEIN:

6 Q. Good morning, Mr. Bredehoft. My name is Mohamed
7 Seifeldein. I'm an attorney with the Department of Labor. I
8 have a few questions for you here based on the discussion
9 that you had with defendants' counsel. Let's just start from
10 the end here.

11 You did not advise defendants that they could
12 continue to classify the nurses as independent contractors,
13 correct?

14 A. I was not asked to give that advice; that's correct.

15 Q. So your advice was exclusively to the probability of
16 prevailing in this case.

17 A. If I remember my exact words, the use of the word
18 "excellent" chance was --

19 Q. It was a yes-or-no question.

20 THE COURT: Well, hold on a second here.

21 The Court's procedure here is the witness may answer
22 "yes" or "no" and explain his or her reason for saying "yes"
23 or "no."

24 So if you can answer it "yes" or "no," you can, and
25 then you can give your opinion, your statement.

—J. Bredehoft - Cross—

1 THE WITNESS: I'm not sure I can answer that "yes"
2 or "no," although I can say that the statement where I said
3 there was an excellent chance of prevailing certainly related
4 to chances of prevailing in this proceeding.

5 BY MR. SEIFELDEIN:

6 Q. I'll come back to that in a second.

7 A. Sure.

8 Q. So you began representing Ms. Pitts and Steadfast in June
9 of 2018?

10 A. I believe that's correct.

11 Q. And your representation ended on or about February 2019?

12 A. Yes, I believe that is correct.

13 Q. And your scope of representation was limited to defending
14 this lawsuit, correct?

15 A. Yes, that's correct.

16 Q. All right. The probability of winning the lawsuit?

17 The scope of the representation was limited to
18 defending the lawsuit that the Department of Labor had
19 brought against defendants, correct?

20 A. Yes. I just said that.

21 Q. Let's have you look at -- it's now going to be PX-103.

22 MR. SEIFELDEIN: Ms. Lewis, it's the e-mail between
23 Mr. Bredehoft and the defendants' counsel.

24 BY MR. SEIFELDEIN:

25 Q. And if we scroll to the bottom of that e-mail, you

—J. Bredehoft - Cross—

1 received an e-mail from defendants' counsel asking to speak
2 with you regarding the advice you gave to defendants,
3 correct?

4 MS. RUST: Sorry, our screen is not on.

5 THE WITNESS: My screen has just come on.

6 (Pause in the proceedings.)

7 BY MR. SEIFELDEIN:

8 Q. And let's just begin by identifying the e-mail, who it
9 came from and to who, for the record, and then we'll get into
10 the vital part.

11 This is an e-mail that you received from Mr. Josh
12 Jewett, counsel for Steadfast and Lisa Pitts, on or about
13 January 11, 2020, and that's your e-mail, correct?

14 A. That's my correct e-mail address, yes.

15 Q. When you received it from defendants' counsel?

16 A. Since 2006, that has been my correct e-mail address.

17 Q. The question was:

18 This is the e-mail you received from defendants'
19 counsel on January 11, 2020, correct?

20 A. Yes. I said that.

21 Q. Okay. Thank you.

22 Now, defendants' counsel asked you -- I'm sorry.

23 This is defendants' counsel asking to speak with you
24 about the advice you rendered to the defendants, correct?

25 A. Yes.

—J. Bredehoft - Cross—

1 Q. All right.

2 MR. SEIFELDEIN: And let's go up to -- higher, the
3 next e-mail.

4 BY MR. SEIFELDEIN:

5 Q. And this is your response, correct?

6 Let's identify it for the record, the date.

7 So that's your e-mail address again. You responded
8 on January 13, 2020, at 8:49 a.m., to defendants' counsel
9 Josh Jewett saying, of course, you're willing to discuss it
10 with them, "although we were not retained to provide that
11 advice."

12 You recognize this document, correct?

13 A. I'm sorry. Did you --

14 Q. Do you recognize this document as your e-mail?

15 A. Sure.

16 Q. Okay. And the advice that you're talking about there is
17 the classification to Ms. Pitts and defendants about their
18 contractors, correct?

19 A. That's exactly correct. We were not retained to provide
20 that advice.

21 Q. Okay.

22 MR. SEIFELDEIN: Keep going to the highlighted part.

23 BY MR. SEIFELDEIN:

24 Q. And this is an e-mail from you to one of your attorneys
25 in the law firm, correct?

—J. Bredehoft - Cross—

1 A. That's correct. Sharon Reyes is the associate who was
2 working with me on the matter.

3 Q. This is an e-mail from February 20, 2020, correct?

4 A. That's correct.

5 Q. And, here, you are checking with one of your associates
6 about the advice you have given, and you asked them to review
7 the documents, although you were almost certain that you had
8 not provided advice regarding classification, correct?

9 A. I don't see anything there on reviewing the documents.
10 I'm sorry.

11 Q. Let's read it.

12 She's relying on advice of counsel -- defendants --
13 saying that "We" -- "we," that's your firm -- "told her that
14 they -- the way she was doing it was correct, the
15 classifications. I do not remember giving her advice --
16 giving her this advice, although I do remember telling her on
17 many occasions that she had a much stronger case than most I
18 have seen."

19 A. And that I believed her individuals were, in fact,
20 independent contractors. This may be a distinction without a
21 difference. Yes, I wrote that. It's correct.

22 Q. So the question was:

23 You didn't give her advice on the classification,
24 and that's you saying that to your counsel and saying it to
25 her counsel as well.

—J. Bredehoft - Cross—

1 MR. JEWETT: Objection. He's mischaracterizing
2 Mr. Bredehoft's testimony.

3 THE COURT: Objection overruled. We're talking
4 about the e-mail here. Now, let's just stick with the e-mail
5 and make it clear what you're talking about, Mr. Seifeldein.

6 BY MR. SEIFELDEIN:

7 Q. I am talking about the e-mail, sir.

8 A. Sure. I wrote it. It is correct. We didn't give
9 advice, but I did tell her on many occasions that she had a
10 much stronger case and that I believed her individuals were,
11 in fact, independent contractors. I told her that.

12 Q. Yes, you told her that.

13 A. If you call that advice or not advice or something that
14 comes up in the defense of a case, that's what I said.

15 Q. Well, that's for the Court to decide.

16 I'm just asking you about what you said and the
17 distinctions that you made.

18 THE COURT: I think the e-mail is clear to the Court
19 what has been said.

20 MR. SEIFELDEIN: Absolutely, Your Honor.

21 BY MR. SEIFELDEIN:

22 Q. So this is the e-mail that your associate sent to you.

23 Could you just read it and identify who the
24 associate is.

25 A. Sure. Ms. Reyes at this time continued to be the

—J. Bredehoft - Cross—

1 associate who had been assigned to the case. She's still an
2 associate with our firm. That is an e-mail that I received
3 from her on February 20th, and I remember reading it, yes.

4 Q. Okay. And this, again, goes to the same topic.

5 Your associate is saying "I did not advise her that
6 they were properly classified. I would only have explained
7 the argument that we were planning to make for summary
8 judgment." Correct?

9 A. That's exactly correct, and that's consistent with my
10 recollection today.

11 Q. Okay. So let's go back to the June 15, 2018, meeting
12 that you had at Ms. Cooper's office.

13 During this meeting, you mainly obtained information
14 from Ms. Pitts, correct?

15 A. That's correct. Ms. Cooper did chime in on a number of
16 cases, but it was mostly Ms. Pitts.

17 I'm sorry. If you're rolling your eyes at me, I
18 will stop doing whatever does that.

19 Q. At the first meeting, sir, you mainly discussed the
20 control factors, such as discipline, schedule control, and
21 the nurses holding multiple jobs, correct?

22 A. That formed the majority of the conversation, yes, in the
23 context of discussing -- yes, in the context of discussing
24 what the overall test was, yes.

25 Q. You also discussed the nurses being registered or working

—J. Bredehoft - Cross—

1 for another agency and you discussed the control factor,
2 right?

3 A. I don't understand your question. We did discuss what
4 you say we discussed. I don't know what the second half of
5 the question means.

6 Q. Let me clarify, Mr. Bredehoft.

7 A. Sure.

8 Q. And I appreciate you saying that you don't understand the
9 question. So if you don't understand the question, just for
10 the record, let me know before you provide an answer, and
11 then I'll restate the question.

12 Does that make sense?

13 A. Okay.

14 Q. Thank you.

15 During the first meeting in June 2018, you discussed
16 with Ms. Pitts that her nurses could work at another job,
17 correct?

18 A. Yes.

19 Q. And you discussed that this is part of the control
20 factor, correct?

21 A. I don't understand the question, and the reason is --

22 Q. Okay --

23 A. -- there's no such thing as a control factor.

24 THE COURT: The Court understands the question. In
25 the last series of questions to you from her counsel, he

—J. Bredehoft - Cross—

1 asked you about the control factor, and you gave testimony
2 about the ability of the nurses to work for other people and
3 that it would not have a negative consequence.

4 So the Court understands what he's asking you. Did
5 you discuss it or didn't discuss the control factor in the
6 first meeting?

7 THE WITNESS: We discussed factor 4, which is the
8 degree of control, absolutely.

9 THE COURT: All right. Let's move on.

10 MR. SEIFELDEIN: Your Honor, just some housekeeping.
11 I'll move to admit PX-103, the e-mail.

12 THE COURT: You don't admit those. You admit --
13 hold on.

14 For what purpose did you do that? No, it wasn't to
15 refresh recollection. So they are admissible.

16 Any objection to the e-mail?

17 MR. JEWETT: Your Honor, these e-mails were not
18 provided as part of the Final Pretrial Order. Consistent
19 with the Court's prior ruling, we object to their admission.

20 MR. SEIFELDEIN: This is rebuttal, and these
21 documents actually were provided by Mr. Bredehoft in response
22 to a subpoena, which I believe that defendants --

23 MR. JEWETT: It wasn't impeachment because
24 Mr. Bredehoft agreed with what the e-mail said.

25 THE COURT: Objection is overruled. The document is

J. Bredehoft - Cross

1 admitted.

2 (Plaintiff's Exhibit PX-103 received in evidence.)

3 THE COURT: The Court has a totally different
4 approach on a situation where you are doing it by bench. The
5 Court understands the Rules of Evidence, so a lot of things
6 you counsel have been arguing about is really a waste of your
7 time, because the Court understands what is admissible and
8 what is not admissible, what weight to give to it, what
9 weight to not give to it. So let's move past the e-mail and
10 get to the core issue that you might want to raise.

11 MR. SEIFELDEIN: Thank you, Your Honor.

12 BY MR. SEIFELDEIN:

13 Q. Mr. Bredehoft, when you met with Ms. Pitts, she
14 demonstrated her knowledge of the Fair Labor Standards Act
15 requirement of overtime and independent contractors, correct?

16 A. Yes, if we're still talking about the first meeting.

17 Q. She demonstrated and expressed an understanding that an
18 employee is one who is economically dependent on the
19 employer, correct?

20 Let me give you an example. She gave you a case
21 where the employees working in her office are classified as
22 employees and paid overtime, if applicable, correct?

23 A. Yes, we discussed that.

24 Q. Okay. She expressed her understanding that Steadfast is
25 responsible to comply with the Fair Labor Standards Act,

—J. Bredehoft - Cross—

1 correct, regarding the office employees?

2 A. Of course.

3 Q. Ms. Pitts explained that she was fully aware of her
4 obligations to pay overtime for the individuals who were
5 employees, correct?

6 A. Yes.

7 Q. She also expressed her understanding that employers are
8 required to pay employees time and a half for hours worked
9 over 40 in a workweek, correct?

10 A. I don't recall discussing the one and a half times, but
11 we did discuss, quote, overtime, unquote.

12 Q. Let's go to the second meeting that you had with
13 Ms. Pitts in January of 2019.

14 And this was a meeting in person, correct?

15 A. Yes.

16 Q. In this meeting, you rendered advice to Ms. Pitts --
17 actually, Ms. Kim was at this meeting as well, correct?

18 A. I'm sorry.

19 Q. Let me strike that.

20 In the meeting, you rendered advice to Ms. Pitts
21 after you spoke with Ms. Pitts and Ms. Kim and after you
22 reviewed some documents, correct?

23 A. I told her what I testified I told her. If that's
24 advice, that's advice.

25 Q. At the second meeting, sir, you met with Ms. Pitts,

—J. Bredehoft - Cross—

1 correct?

2 A. Yes.

3 Q. And prior to this meeting, you received information from
4 Ms. Pitts, Ms. Kim, and then some documents, correct?

5 A. I don't believe I received any new documents at that
6 meeting. I believe I brought a document to the meeting. But
7 the answer to the rest of your question is yes.

8 Q. Prior to the meeting, prior to you rendering advice to
9 Ms. Pitts, you had spoken with Ms. Pitts and Ms. Kim,
10 correct?

11 A. I don't recall my conversations, if any, with Ms. Kim
12 prior to that meeting.

13 Q. Okay.

14 A. Otherwise, the answer to your question is yes.

15 Q. And you received some documents sometime between
16 January -- excuse me -- June 2018 and the second meeting in
17 January of 2019, correct?

18 A. Yes.

19 Q. And you reviewed those documents?

20 A. As I discussed, I didn't review all of them, but I did
21 review many of them.

22 Q. And the advice that you gave to defendants at that second
23 January 2019 meeting was based on information provided to you
24 by Ms. Pitts and Ms. Kim, correct?

25 A. And the documents, yes, correct.

—J. Bredehoft - Cross—

1 Q. You never conducted an independent factfinding to verify
2 whether the information Ms. Pitts and Ms. Kim gave you were
3 the actual practices of the business?

4 MR. JEWETT: Objection. The question is vague.

5 THE COURT: Objection overruled. The question is
6 clear.

7 THE WITNESS: The answer is no, Your Honor.

8 THE COURT: Okay. He answered it "no."

9 BY MR. SEIFELDEIN:

10 Q. You did not speak to any of the nurses, correct?

11 A. No -- I mean, sorry, yes, correct, I did not speak to any
12 of the nurses.

13 Q. And you did not speak to Steadfast client facilities,
14 correct?

15 A. Yes, that is correct.

16 Q. You did not speak to any office employees, schedulers at
17 Steadfast, correct?

18 A. I had no substantive discussions. I may have said "hi,"
19 but no substantive discussions, no.

20 Q. Well, excluding Ms. Kim, who was the manager, correct,
21 you had no discussion with any of the office employees?

22 A. No substantive discussions, that's correct.

23 Q. So you've had conversations with office employees?

24 A. No. I may have said "hi" to them. That's what I said.
25 But I've had no substantive discussions with any of those

—J. Bredehoft - Cross—

1 office employees.

2 Q. So you went to her office?

3 A. Yes. That's where the second meeting took place.

4 Q. All right. And the purpose of your document review was
5 to determine if Steadfast was in compliance with the Fair
6 Labor Standards Act?

7 A. That plus to comply with the discovery requests that had
8 been served by the Department of Labor.

9 Q. And you reviewed information that Steadfast provided to
10 you, some of it, as you said?

11 A. I reviewed, I believe, all of the nurse contracts, all of
12 the contracts with the facilities, and what I thought to be
13 a, and still think to be, representative sample of the
14 invoices, but not all of them.

15 Q. Sure.

16 Based on your review of the information provided to
17 you, you provided defendants with advice as to how to comply
18 with the Fair Labor Standards Act with respect to the nurses
19 in January of 2019, correct?

20 A. I believe the advice -- no, that's incorrect. The advice
21 that I --

22 Q. You answered the question.

23 THE COURT: Let him finish. I don't think he
24 finished his answer.

25 MR. SEIFELDEIN: Sure.

—J. Bredehoft - Cross—

1 THE WITNESS: Thank you, Your Honor.

2 I did not provide them with advice going forward on
3 what to do at all. I had provided my view that what they
4 were doing was in compliance with the Fair Labor Standards
5 Act to a very high degree of certainty. And I said those
6 words.

7 BY MR. SEIFELDEIN:

8 Q. You provided two pieces of advice to defendants during
9 that meeting, correct?

10 A. Two prophylactic pieces of advice, yes, I did.

11 Q. And during the course of your representation,
12 Mr. Bredehoft, you provided -- well, the first one was a
13 review -- you reviewed their website, correct?

14 A. Yes, I did.

15 Q. Okay. And in reviewing the website, Steadfast sought
16 input from you regarding a document entitled "Employment
17 Application" that the nurses used to apply to work for
18 Steadfast, correct?

19 A. No, that's not correct. They did not seek the advice. I
20 proffered it.

21 Q. Okay. You proffered advice regarding a document entitled
22 "Employment Application," correct?

23 A. That's correct. And I sought additional information
24 about its use.

25 Q. Okay. And you had concerns about this, quote, Employment

—J. Bredehoft - Cross—

1 Application Form, correct?

2 A. No, "concerns" is not the correct word.

3 Q. You told Steadfast and Ms. Pitts that they should not use
4 a form labeled as "Employment Application," correct?

5 A. That's correct, because they weren't hiring employees.

6 Q. Because it shows an employee-employer relationship,
7 correct?

8 A. Absolutely not. And as the Court knows, the label -- and
9 I told Ms. Pitts this during the meeting.

10 The label on an agreement has virtually no meaning
11 in this context. You can call somebody an "independent
12 contractor" 30 times from Sunday. It doesn't mean a darned
13 thing. But I told her that since she was not hiring
14 employees, she shouldn't use something that says "Employment
15 Application."

16 Q. If it didn't matter, why did you ask her to not use it?

17 A. Because it was wrong.

18 Q. Wrong in what sense?

19 A. She was not hiring employees.

20 Q. So she was not hiring employees, it was wrong, and you
21 asked her to remove it?

22 A. That's correct.

23 Q. But you had no concern about that?

24 THE COURT: Well, I think we're going around in
25 circles here. I think that question has been answered.

—J. Bredehoft - Cross—

1 MR. SEIFELDEIN: I understand, Your Honor. Thank
2 you.

3 BY MR. SEIFELDEIN:

4 Q. And you did not follow up with defendants to see, in
5 fact, if they had stopped using the Employment Application
6 Form, correct?

7 A. Yes, it is correct; I did not follow up.

8 Q. So Steadfast used this Employment Application from at
9 least 2015 through 2019, as far as you know, when your
10 representation ended -- February 2019, to be exact?

11 A. There -- no, that's not correct.

12 Q. Okay. You have no knowledge that they stopped using the
13 application after February 2019?

14 A. I have no knowledge relating to that.

15 Q. Okay. All right.

16 So you discussed this with counsel, and one of the
17 documents that you reviewed and just talked about are the
18 Independent Contractor Agreements, correct?

19 A. I'm sorry. I don't understand what your question means
20 when I discussed it with counsel.

21 Q. Well, you reviewed a document that Steadfast gave you
22 that's been labeled by Steadfast as Independent Contractor
23 Agreement?

24 A. I reviewed many of them. They were not all the same.

25 Q. Okay. But you reviewed some of them?

—J. Bredehoft - Cross—

1 A. I reviewed each that I was given.

2 Q. Okay. And this is what Steadfast required the nurses to
3 sign, correct, the Independent Contractor Agreement?

4 A. Every one that I read -- yes, to the best of my
5 knowledge, they were all signed by nurses. It was not a
6 form.

7 Q. And when you reviewed the Contractor Agreement, did you
8 proffer or express some concerns about a clause in the
9 Independent Contractor Agreement -- actually, let me rephrase
10 that. Strike that.

11 When you reviewed the contract, you proffered or
12 expressed some concerns about a clause in the contract,
13 correct?

14 A. It was a clause present, yes, in a number but not all of
15 the contracts.

16 Q. And this clause has been referred to as a "covenant not
17 to compete," correct?

18 A. Yes, I understand what you mean by that; and, yes, it
19 was.

20 Q. And you informed defendants, Ms. Pitts and Steadfast,
21 that the clause was inappropriate because, quote, it was
22 inconsistent with their classifications as independent
23 contractors, correct?

24 A. I first informed them that it was inconsistent with their
25 practices as described to me, and then I, yes, did say it

—J. Bredehoft - Cross—

1 would, in the context of their employment, be inconsistent
2 with the independent contractor status.

3 Q. So you determined that this restrictive covenant or
4 covenant not to compete was "inappropriate" -- your word --
5 because it demonstrates an element of control, correct?

6 A. I think it may go more to permanence than control, but it
7 does go to control. In any event, I think in the context of
8 the registry, it is inappropriate and shouldn't be there.

9 Q. All right. So this element of control or permanency that
10 you're talking about is inconsistent with the nurses being
11 classified as independent contractors, correct?

12 A. If any of the nurses obeyed it and if Steadfast ever
13 enforced it, yes, it would have been, in this context,
14 inconsistent with my notion that they were independent
15 contractors.

16 MR. SEIFELDEIN: Your Honor, I move to strike that.
17 The witness didn't answer the question, and he answered with
18 a hypothetical. I believe the Court instructed the witness
19 to say "yes" or "no" and then provide an explanation.

20 THE COURT: Well, I think the Court understood the
21 response, and I think it was responsive. Even though he
22 didn't follow the Court's instructions to answer "yes" or
23 "no," I think it was responsive. At least the Court
24 interpreted it as being inconsistent with being an
25 independent contractor. That's the way the Court interpreted

—J. Bredehoft - Cross—

1 it. So let's just move on.

2 MR. SEIFELDEIN: Thank you, Your Honor.

3 BY MR. SEIFELDEIN:

4 Q. And you instructed Ms. Pitts and Steadfast to remove the
5 language from the Independent Contractor Agreement, correct?

6 A. Yes.

7 Q. You also told Steadfast and defendant Ms. Pitts to make
8 sure that the covenant-not-to-compete clause is not in any of
9 the current agreements, correct?

10 A. Yes.

11 Q. And you did not follow up to see whether they had, in
12 fact, removed that?

13 A. No, I did not.

14 Q. And that's because your representation ended in
15 February 2019?

16 A. I don't remember the date, but that's about the time.

17 Q. Okay. And this advice was in January of 2019, correct?

18 A. That's correct.

19 Q. So you had, maybe, a month that you did not follow up
20 with her?

21 A. No. I didn't review her agreements that were generated
22 in that month, no.

23 Q. And you were not retained, Mr. Bredehoft, to determine
24 the classification of the workers as employees or independent
25 contractors, correct?

—J. Bredehoft - Cross—

1 A. That's correct. I was retained to defend the lawsuit.

2 THE COURT: I think that's been asked and answered.

3 MR. SEIFELDEIN: Apologize, Your Honor.

4 THE COURT: Okay.

5 BY MR. SEIFELDEIN:

6 Q. In fact, defendants never asked you if the workers can
7 continue to be classified as independent contractors,
8 correct?

9 A. No, not in those words.

10 Q. Well, let's look at your exact words in the transcript.

11 THE COURT: What exhibit number is that?

12 MR. SEIFELDEIN: This exhibit has not been marked
13 yet. So it will be PX-104, Your Honor, the deposition of
14 Mr. Bredehoft.

15 THE COURT: PX-104 for identification.

16 (Plaintiff's Exhibit PX-104 marked for
17 identification purposes only.)

18 BY MR. SEIFELDEIN:

19 Q. Do you recall being deposed on March 13th, 2020, by the
20 Department of Labor?

21 A. Yes, I do.

22 Q. And you were under oath during that deposition?

23 A. Yes, I was.

24 Q. All right. Those are your words, correct, sir?

25 THE COURT: Wait a minute, now refer him to the line

—J. Bredehoft - Cross—

1 and the question.

2 BY MR. SEIFELDEIN:

3 Q. Mr. Bredehoft, I'm referring to the highlighted portion
4 of the deposition beginning with line 12, ending with
5 line 20.

6 A. Yes, those are my words. Those are my answers, and that
7 is correct and consistent with what I just testified to.

8 THE COURT: For the record, you should read the
9 question and then let him read the answer because otherwise
10 the Court doesn't have the transcript. Those are your words.

11 MR. SEIFELDEIN: Correct. I was giving him an
12 opportunity to review it.

13 BY MR. SEIFELDEIN:

14 Q. Mr. Bredehoft, let me just state for the record the
15 question that was asked of you.

16 "Okay. Did you ultimately advise Ms. Pitts that the
17 RNs, CNAs, and LPNs could remain classified as independent
18 contractors?"

19 Your answer?

20 A. "She did not ask me that question, so I did not answer
21 it."

22 Q. "Did you ever follow up with Ms. Pitts about the
23 classification of the nurses following the advice you
24 provided?"

25 We're reading the transcript here. Your answer,

—J. Bredehoft - Cross—

1 line 20?

2 A. "No."

3 Q. Okay. And I asked you:

4 "Defendants never asked you if the workers can
5 continue to be classified as independent contractors,
6 correct?"

7 A. "That's correct."

8 Q. And you did not advise Ms. Pitts that the defendants
9 could continue to be -- excuse me -- the nurses --

10 A. I'm sorry. Sir, I'm having a problem hearing you.

11 Q. I apologize, Mr. Bredehoft.

12 You did not advise defendants to continue to
13 classify the nurses as independent contractors, correct?

14 MR. JEWETT: Objection. This has been asked and
15 answered. He's gone around the same question multiple times
16 now.

17 THE COURT: I think the question -- the objection is
18 sustained. The answer is clear. You've refreshed his
19 recollection, or if you want to call it impeachment with the
20 transcript, but the question has been answered.

21 MR. SEIFELDEIN: All right.

22 BY MR. SEIFELDEIN:

23 Q. Mr. Bredehoft, you did not discuss the degree of skill
24 required with defendants as you assumed that there is some
25 degree of skill required, correct?

—J. Bredehoft - Cross—

1 A. We discussed it only to the extent I previously testified
2 today, that there was no unusual degree of skill either
3 required or maintained by these nurses.

4 Q. Okay. And based on your conversation with Ms. Pitts, you
5 were not aware of the average length of placement
6 opportunities of the nurses and did not ask about it,
7 correct?

8 A. That is correct; I did not ask about it. We discussed
9 not averages but examples.

10 Q. Okay. And, in fact, Mr. Bredehoft, you do not know what
11 led defendants to classify the nurses as independent
12 contractors, correct?

13 A. No. That was done before I was involved.

14 Q. Okay. You testified about a distinction between
15 registries and staffing agencies.

16 You are aware, sir, that the Department of Labor
17 does not make a distinction between agencies and registries
18 and that it's economic realities that determines the
19 relationship, correct?

20 MR. JEWETT: Objection. Your Honor, this is the
21 same line of questioning that the Court instructed me not to
22 go down. We're getting into his opinions about
23 classifications and registries, and I adhered to that.

24 THE COURT: The Court doesn't recall dealing with
25 any objection talking about the difference between the

—J. Bredehoft - Cross—

1 staffing agency and the registry, and I think he gave
2 testimony on direct about what a staffing agency was versus
3 what a registry was. So I permitted him to basically examine
4 on that, and that only.

5 THE WITNESS: I'm aware of no regulation, guidance,
6 or opinion letter that discusses the difference or the
7 similarities that has been issued by the Department of Labor.
8 They are examined by the same economic realities test. It
9 applies across the board.

10 BY MR. SEIFELDEIN:

11 Q. And, Mr. Bredehoft, you did not discuss what's been
12 referred to as Field Bulletin 2018-4 with Ms. Pitts, correct?

13 A. 2004-18 [sic] does not come immediately to mind.

14 Q. Let me ask it in a general way.

15 You did not discuss -- you did not discuss with
16 defendants a field bulletin that the Department of Labor has
17 put out regarding classification?

18 A. Regarding -- I'm sorry, classifications of nurses in
19 staffing agencies?

20 Q. Uh-huh.

21 A. No, I did not discuss that.

22 Now I am familiar with it that you've refreshed my
23 recollection. I haven't looked at it in years, but I know it
24 exists. I know I've read it.

25 Q. And you were the second attorney that defendants have

—J. Bredehoft - Cross—

1 hired in this matter, correct?

2 MR. JEWETT: Objection. Relevance.

3 THE COURT: Well, before you -- I'll sustain it.
4 Let's see where you're going with that question,
5 Mr. Seifeldein.

6 What is the relevance of that question?

7 BY MR. SEIFELDEIN:

8 Q. Is that correct, sir?

9 A. I don't know if I'm second. I know I wasn't first.

10 THE COURT: Wait a minute. You didn't answer my
11 question. I asked you what was the relevance of asking that
12 question?

13 MR. SEIFELDEIN: I'll move on, Your Honor.

14 THE COURT: You'll move on?

15 MR. SEIFELDEIN: Yes.

16 THE COURT: Wonderful.

17 THE WITNESS: My answer was I don't know.

18 THE COURT: It doesn't matter. It's a relevance
19 issue.

20 BY MR. SEIFELDEIN:

21 Q. Based on your discussion, Mr. Bredehoft, with defendants,
22 were you aware that Steadfast nurses could not directly
23 negotiate the rate of pay with the facilities?

24 A. Yes, I was told that the facility sets the rate of pay.

25 Q. And you relied on that?

—J. Bredehoft - Cross—

1 A. Yes, I did.

2 Q. And you testified about having experience in advising
3 others about Fair Labor Standards Act compliance, correct?

4 A. I didn't hear the third word.

5 Q. You -- based on your experience, you advised others about
6 compliance with the Fair Labor Standards Act, correct?

7 A. Yes.

8 Q. And you've advised clients generally about when an
9 individual can be classified as an independent contractor or
10 an employee, correct?

11 A. Yes.

12 Q. And does the name "First Choice" ring a bell?

13 MR. JEWETT: Objection, Your Honor. I think the
14 identification of Mr. Bredehoft's clients are privileged to
15 the extent they are not on the public docket.

16 THE COURT: I don't know where he's going with the
17 question yet, Mr. Jewett. So I can't sustain it, so I'll
18 overrule it.

19 Let me see where you're going with the question.
20 The question was:

21 Does the name "First Choice" ring a bell?

22 THE WITNESS: Yes, it does.

23 BY MR. SEIFELDEIN:

24 Q. How do you know First Choice?

25 A. Over 20 years ago, when I was a partner at Venable, I

—J. Bredehoft - Cross—

1 represented a First Choice Automotive. In Florida, I also
2 provided advice and currently am providing advice to First
3 Choice Credit Union. It's a common name. I really don't
4 recall any others.

5 THE COURT: So what is the question?

6 BY MR. SEIFELDEIN:

7 Q. Are you familiar with the staffing agency in the Hampton
8 Roads area that is called "First Choice"?

9 A. The name does not ring a bell for me. It may be a
10 partner's client who asked me a question once, but it does
11 not ring a bell for me in that context.

12 Q. All right. Well, let's move on.

13 You were aware that Steadfast provided Workers'
14 Compensation to the nurses, correct?

15 A. Yes, gratuitously so.

16 Q. And you took that determination in rendering your advice
17 about defending this case, correct, when you represented
18 Steadfast?

19 A. I didn't ignore it, but it did not form any part of the
20 basis for my determination.

21 Q. And in your discussion with Steadfast and the documents
22 that were provided to you, you were not provided with memos
23 that Steadfast had sent to the nurses, correct?

24 A. I believe that is correct. We had not been provided any
25 of those at that time.

—J. Bredehoft - Cross—

1 Q. Okay. And so in rendering that advice that you gave
2 Steadfast, these memos were not part of that consideration,
3 correct?

4 A. That's correct.

5 Q. Okay. And would that have an impact -- would that have
6 an impact on the advice you have given Steadfast?

7 A. Depends on what the memos say.

8 Q. Right. So absent the memos, you wouldn't know.

9 A. That's correct.

10 Q. You are aware, sir, that mere reliance on the advice of
11 counsel alone is insufficient to satisfy the burden of
12 proving good faith in the Fair Labor Standards Act?

13 THE COURT: Sustained. That is something the Court
14 will deal with, and he doesn't have to deal with that. So
15 objection to that question.

16 BY MR. SEIFELDEIN:

17 Q. You didn't receive memos. You didn't review them. You
18 don't know what is in them.

19 A. I just testified to that.

20 Q. And you've also discussed with Steadfast its -- some of
21 its reimbursement policies and practices, correct?

22 A. Yes. We discussed several of those.

23 Q. And you took that into consideration in rendering your
24 opinion regarding defending the case?

25 A. Yes, I did.

—J. Bredehoft - Cross—

1 MR. SEIFELDEIN: Your Honor, may I refer with my
2 co-counsel?

3 THE COURT: You may.

4 (Pause in the proceedings.)

5 MR. SEIFELDEIN: Thank you, Your Honor.

6 May I confer with counsel again?

7 THE COURT: Last time.

8 (Pause in the proceedings.)

9 BY MR. SEIFELDEIN:

10 Q. Mr. Bredehoft, you are aware that Steadfast sets the rate
11 of pay for the nurses, correct?

12 A. It is my understanding that the hospitals say what they
13 are willing to pay, and that is used to generate a rate of
14 pay for the nurses by Steadfast.

15 Q. Mr. Bredehoft, you are aware that defendants did not take
16 into account the nurses' skills and experience when they
17 determined the rate of pay, correct?

18 A. Yes. Absolutely, they did not.

19 Q. They did not?

20 A. Absolutely not.

21 Q. Okay. Based upon your conversation with Ms. Pitts, you
22 are aware that Steadfast nurses had no contractual or
23 economic relationship with the facilities, correct?

24 A. Other than through Steadfast, yes, that's correct.

25 Q. Okay.

—J. Bredehoft - Cross—

1 A. I'm sorry. That may not be correct.

2 We did discuss that others may have had -- and this
3 is in my deposition -- some of the nurses may have had
4 separate non-Steadfast economic relations or contracts and
5 that I did not know if that occurred.

6 Q. Based upon your conversation with Ms. Pitts, you are
7 aware that Steadfast nurses are required to track their hours
8 as a requirement to receive compensation, correct?

9 A. Of course.

10 Q. And based on your conversation with Ms. Pitts, you are
11 aware that Steadfast nurses could not directly negotiate
12 their pay rate with the facilities, correct?

13 A. I think I just testified to that by saying the facilities
14 set the rate and that Steadfast adjusted it. That's right.
15 That's what I just said.

16 Q. I'll make it clear for the record because I didn't
17 understand you, Mr. Bredehoft.

18 A. Sure. My understanding is -- sorry. Would you like to
19 ask me a different question?

20 Q. If I could. And forgive me.

21 The question is:

22 Based upon your conversation with Ms. Pitts, the
23 nurses could not directly negotiate their pay rate with the
24 facilities?

25 A. Yes, that's correct.

—J. Bredehoft - Cross—

1 Q. Mr. Bredehoft, Steadfast, as far as you know, only
2 provides nurses to facilities, correct?

3 That's the main line of business. Nurses are needed
4 at facilities, and Steadfast provides those nurses, correct?

5 A. No. Steadfast provides a registry to match facilities
6 and nurses.

7 Q. Okay. So they send nurses to certain facilities.

8 A. They match them. The nurses go themselves.

9 I'm not sure what else you are asking.

10 Q. I understand.

11 So nurses are an integral part of Steadfast's
12 business, correct?

13 A. No. Steadfast's business is operating the registry. It
14 doesn't practice medicine. It doesn't have a license to
15 practice nursing, and if it tried to practice nursing, it
16 would be prosecuted by the State.

17 Q. So in Steadfast's matching the nurses with the
18 facilities, would you agree that absent the nurses, the
19 business would cease to exist?

20 A. Yes.

21 MR. SEIFELDEIN: No further questions, Your Honor.

22 THE COURT: Any redirect?

23 MR. JEWETT: Very briefly, Your Honor.

24 THE COURT: Very briefly, you may redirect.

25 MR. JEWETT: Yes, sir.

—J. Bredehoft - Redirect—

REDIRECT EXAMINATION

BY MR. JEWETT:

Q. Thank you, Mr. Bredehoft.

Mr. Seifeldein asked you a few questions about a noncompete.

A. Yes, sir.

Q. And do you recall that?

A. Yes, sir.

Q. Did Ms. Pitts provide you any information about whether that noncompete was actually enforced?

A. I was told both at the first meeting in June of 2018 and emphatically at the second meeting in January of 2019 -- and I believe Ms. Kim was in the room and seconded this, but Ms. Pitts was emphatic that it had never been enforced, it had never been threatened to be enforced, and she also told me that all the nurses knew it because they signed up with other registries and services.

Q. Mr. Seifeldein asked you a couple of questions about some prophylactic advice that you provided.

A. Yes, sir.

Q. I believe you testified that you recommended to Steadfast to remove the noncompete language.

A. That's correct.

Q. And that they remove the term "employment" from the application paperwork; is that correct?

—J. Bredehoft - Redirect—

1 A. From the application that was on their website. It was
2 not a frequently used one. They told me that.

3 Q. The opinion that you provided to Steadfast, was that
4 contingent on them making those two changes that you just
5 testified to?

6 Let me clarify that.

7 The opinion that the nurses are properly classified,
8 was it contingent on her making those two changes?

9 A. The views I expressed about the proper classification are
10 not at all contingent on stopping using the employment
11 agreement, although it would be a silly thing not to have
12 done.

13 With respect to the noncompete, if the noncompete
14 was enforced or threatened to be enforced, then my views
15 would change; but, otherwise, no, they were not contingent
16 views.

17 MR. JEWETT: Thank you. I have no further
18 questions.

19 THE COURT: Counselor, the Court heard you say you
20 were not asked to give advice about whether the nurses were
21 properly classified as independent contractors versus
22 employees; is that correct?

23 THE WITNESS: That is correct, Your Honor.

24 THE COURT: At the same time, it appears as though,
25 the testimony is, that you told her that they were

—J. Bredehoft - Redirect—

1 independent contractors.

2 THE WITNESS: Yes. In the course of evaluating the
3 case, I told her that it -- well, she had an excellent chance
4 of prevailing on that. And I used the term "excellent." And
5 that, yes, they were independent contractors, in my view.

6 THE COURT: And whatever advice you gave to
7 Ms. Pitts was dependent upon your opinion or belief that you
8 had all the facts necessary to reach that conclusion; is that
9 correct?

10 THE WITNESS: Yes, that I had all material facts.

11 THE COURT: Now, if, in fact, there were critical
12 issues that you were not provided, then you would not be able
13 to issue that opinion with such confidence. Would that be
14 correct?

15 THE WITNESS: By definition, if they were critical,
16 then, yes, that is correct.

17 THE COURT: All right. May this witness be
18 permanently excused?

19 MR. JEWETT: Yes, Your Honor.

20 MR. SEIFELDEIN: Yes, Your Honor.

21 THE COURT: Thank you, sir.

22 THE WITNESS: Thank you, Your Honor.

23 (Witness excused.)

24 THE COURT: We're going to take a 15-minute recess,
25 and then we'll come back and continue.

1 (Recess from 11:23 a.m. to 11:43 a.m.)

2 THE COURT: Okay. You may call your next witness.

3 MR. SIEGRIST: Your Honor, we have some designations
4 from some depositions to admit into the record, if you would
5 permit.

6 THE COURT: All right.

7 MR. SIEGRIST: Your Honor, we have two sets of
8 depositions here. The first is -- the plaintiffs have filed
9 supplemental designations of the deposition of Zira
10 Technologies, the 30(b)(6) deposition. We filed our
11 counter-designations, and I would move to admit those into
12 the record, unless there's an objection.

13 THE COURT: This deposition is from Zira
14 Technologies?

15 MR. SIEGRIST: Yes, Your Honor.

16 THE COURT: Hopefully you have already made your
17 designations?

18 MS. LEWIS: I'm sorry, Your Honor?

19 THE COURT: Have you already made your designations?

20 MS. LEWIS: We made our designations, and we,
21 likewise, filed our objections too.

22 THE COURT: All right. Then the Court will admit
23 your designations from that deposition.

24 MR. SIEGRIST: Thank you, Your Honor.

25 THE COURT: We need exhibit numbers on them.

1 What are the exhibit numbers on your depositions?

2 MS. LEWIS: Our depositions are all under PX-2, and
3 then pursuant to local rules, there's deposition summaries
4 for the same at PX-3.

5 THE COURT: So that the Court can match these things
6 up easily when we look at them, if all of yours are under
7 PX-2 --

8 MS. LEWIS: That is correct.

9 THE COURT: -- what we're going to do is see if we
10 can adopt a number so that the defendants' will be DX-2, or
11 whatever, so that the Court can easily match them up when
12 we're going through.

13 Is that number available, Madam Clerk?

14 THE CLERK: Yes, sir.

15 THE COURT: All right. And you will tender them to
16 the clerk. Just pass them to her.

17 MR. SIEGRIST: Your Honor, we also have some
18 designations from the deposition transcript of the Wage and
19 Hour investigator who was unavailable at this trial due to
20 his illness.

21 THE COURT: Are there any objections to those?

22 MS. LEWIS: Yes, sir. We, likewise, filed
23 objections and counter-designations to those additional ones.

24 THE COURT: Are all of those under PX-2?

25 MS. LEWIS: All of ours are all under PX-2, yes.

1 THE COURT: Then we'll do the same thing with
2 respect to that one.

3 MR. SIEGRIST: I would like to raise that issue with
4 the Court on this topic.

5 We have a number of designations in the pretrial
6 order that were not objected to and that concern,
7 essentially, the same subject matter as our supplemental
8 designations which we filed after Mr. Mazuera became
9 unavailable.

10 In response to that, we got a number of objections
11 from the plaintiff that, one, many of them are objections to
12 designations that were in the Pretrial Order and waived; but,
13 secondly, if waived, they have designated, essentially, the
14 entire deposition transcript, Page 3 to 305. I've never,
15 frankly, seen that before, Your Honor.

16 THE COURT: How many pages in the deposition?

17 MR. SIEGRIST: I think it's 305. So they designated
18 302 pages of the deposition as a counter-designation.

19 Frankly, Your Honor, I think there are two issues
20 with this one. I don't think that's efficient for the
21 Court's review of the relevant portions; but, also, I don't
22 think it cures the -- some of the objections, for example,
23 are to completeness.

24 In my experience, typically if there is a
25 completeness objection and a counter-designation, you

1 supplement -- you counter-designate the portion that you
2 believe renders a complete narrative on a discrete topic.
3 But, frankly, I don't think the Court is going to be assisted
4 by a counter-designation of the entire transcript.

5 THE COURT: Okay. What is the name of the
6 deposition, anyway? You said from the Wage and Hour
7 Division.

8 MR. SIEGRIST: Investigator Alvaro Mazuera. He was
9 the Wage and Hour investigator for the Department of Labor.

10 THE COURT: What I was trying to get, Ms. Lewis, is
11 why so many objections to the transcript, the deposition?

12 MS. LEWIS: Your Honor, the answer to the Court's
13 question, there's objections to the depositions because,
14 within the designations that they've made, the deposition
15 didn't necessarily flow, and so they have an answer here, but
16 the question may have been asked 30 pages earlier. And so
17 with respect to the designations that they made, they are
18 really incomplete. So to understand the context of what the
19 question came up, they only picked out a single line.

20 The designation of the -- the objection -- first, to
21 be clear with respect to the previous designations that were
22 made in the Pretrial Order, that was before times had changed
23 and the deponent was unavailable, and we lodged our
24 objections because they said he would be available. Now
25 they've identified counter-designations which, frankly, this

1 isn't about what the Department of Labor did; it's about what
2 defendants did.

3 So to the extent that they believe that they're
4 necessary and relevant to the Court's determination and he's
5 not available here to testify, Your Honor, I think it's
6 important for the Court to have the completeness of what his
7 testimony was, particularly in light of the cherry-picking of
8 answers that just, frankly, are confusing and don't make any
9 sense.

10 THE COURT: Here is what the Court is going to do:

11 The Court is just going to have to admit the whole
12 deposition. Counter-designations, et cetera, et cetera, the
13 Court is going to have to deal with the whole deposition.
14 Because you all have picked it apart so badly, the Court is
15 going to have to deal with the whole deposition.

16 MR. SIEGRIST: Your Honor, I would ask to be heard
17 on that topic.

18 Plaintiff's counsel's representation on the manner
19 in which we designated this is entirely inaccurate, and we've
20 mixed discrete topics. I'm not aware of any designations
21 that are a one-line response; and, frankly, Your Honor, I'm
22 prepared to address each and every one of these objections in
23 detail.

24 I understand the --

25 THE COURT: We're not going to do it.

1 MR. SIEGRIST: -- Court may not want to do that;
2 but, Your Honor, it's simply incorrect to say that we have
3 cherry-picked these. These are discrete topics, and I don't
4 agree with the characterization.

5 THE COURT: The Court will make its own
6 determination about the deposition. You can put your
7 counter-designations in there, and the Court will simply have
8 to look at the entire deposition.

9 So that will be DX-2, whatever, your deposition
10 there, and we'll just take a look at the entire deposition
11 and the Court will make its own determination about what is
12 relevant and what is not relevant in that deposition.

13 (Defendants' Exhibit DX-2 received in evidence.)

14 THE COURT: Next. Your next witness.

15 MS. RUST: Your Honor, we do not have any further
16 witnesses. I do have one housekeeping item to address with
17 the Court before we rest.

18 THE COURT: All right. You have a further
19 housekeeping note?

20 MS. RUST: Yes.

21 THE COURT: All right. That's fine.

22 MS. LEWIS: Your Honor, I, likewise, just have one
23 housekeeping note with respect to PX-101. I don't think I
24 made it clear yesterday with respect to that one.

25 THE COURT: All right. Well, I'll deal with yours

1 in a minute.

2 Let's see what your housekeeping note is.

3 MS. RUST: Okay. Your Honor, we wanted to address
4 an issue that was raised by the plaintiff regarding the
5 production of DX-76, 77, and 78 on Tuesday.

6 During Ms. Kim's testimony, the Secretary
7 represented to the Court that those were not produced in
8 discovery, and as we understand it, the Court excluded DX-78
9 as a result of that representation.

10 Because it was more of a discovery issue, which is
11 the function of the pretrial conference and order, that came
12 as a surprise, since it was the first time that the Secretary
13 had ever made any indication of not being in possession of
14 those exhibits.

15 So after those representations were made, we
16 reviewed our files, reviewed the information and
17 communications on these, and as we understood it, it was not
18 accurate, and we just wanted to take an opportunity to
19 correct the record by reviewing a couple of the relevant
20 dates on which these exhibits were produced and discussed
21 with the Secretary.

22 On February 23rd and 24th, DX-76, 77, and 78 were
23 all produced to the Department of Labor via their file share
24 platform Kiteworks, which they required us to use to produce
25 large files. That same week, within a couple of days, the

1 attorneys had their attorney conference to -- prior to the
2 pretrial conference to review all the exhibits, objections,
3 discuss, confirm those. It was never represented that those
4 video files were not in their possession.

5 On March 3rd, we had a several-hour-long pretrial
6 conference with Judge Leonard. The Secretary asserted five
7 different objections to DX-78, five different objections to
8 77, and five different objections to 76. At no point did the
9 Secretary assert that they were not even in possession of
10 these exhibits. The objections went to substantive aspects
11 of the content of those exhibits.

12 And then on March 13th, the Secretary's counsel sent
13 proposed topics to our office for the corporate deposition of
14 Zira Technology. The first topic in the proposed topics was
15 the subjects addressed in your DX-77 and 78.

16 On March 19th, they issued their notice of corporate
17 deposition. The first topic was knowledge about the subjects
18 addressed in Steadfast Exhibits DX-75 through 78 and when and
19 who recorded them. It would be impossible or difficult to
20 depose Zira Technologies regarding exhibits that they did not
21 have in their possession.

22 And on March 30th, they actually conducted the
23 deposition of Zira. In that transcript, they deposed
24 Mr. Vora regarding a video that was a minute and 44 seconds
25 long and described it as the training videos for facilities.

1 The Pretrial Order describes DX-78 as the "Steadfast Zira
2 Workforce Video for Facilities."

3 During Ms. Kim's testimony, I specified that DX-78
4 was one minute and 44 seconds long. So this is the same
5 video as DX-78, which the Secretary represented during her
6 testimony that they were not in possession.

7 So, again, after all of that, during the testimony,
8 this was the first time that they indicated that they did not
9 have possession of that file, without even taking the
10 opportunity to review the video to confirm whether it was the
11 same video that they had in their possession. As we
12 understood it, as a result of that misrepresentation, the
13 Court excluded DX-78 from evidence.

14 Since that is typically dealt with in pretrial
15 conference and orders, we wanted to make sure that we had an
16 opportunity to address that and correct that for the record,
17 since it apparently impacted the admission of certain
18 evidence.

19 THE COURT: All right. Well, I thank you very much.

20 Two things here: Number one, 76 is already in.

21 The Court is going to admit 77. If we didn't, 77
22 is coming in, because I've said that I will withhold and
23 delay admission of 77 until cross-examination takes place.
24 So 77 is coming in.

25 (Defendants' Exhibits DX-76 and DX-77 received in

1 evidence.)

2 THE COURT: So that just leaves 78. Let me hear
3 from the plaintiff.

4 Ms. Lewis, come around to the podium, please.

5 So we're just talking about 78. 76 and 77 are not
6 at issue here. The question is this:

7 I know it was represented that you didn't have it.
8 According to what she said, you did have it. So was that
9 just an error or omission or what?

10 MS. LEWIS: No, Your Honor. First of all, I would
11 like to correct, one, what the contentions were that
12 defendants just made.

13 The representation from the Court was that Christine
14 Kim created 76, 77, and 78. Based upon that proposition, the
15 Secretary asserted and still maintains that if those
16 documents, those videos, were created by Christine Kim, we
17 did not receive videos created by Christine Kim; hence the
18 reason why we had and the Court ordered defendants to make
19 available Arjun Vora, a 30(b)(6) representative for Zira
20 Technologies, who confirmed and has already been admitted
21 onto the record that he created those videos.

22 So the issue is not that we didn't have the videos.
23 It was based upon the representations of the testimony that
24 defendants asserted that they were created by Christine Kim,
25 and we maintain that position.

1 THE COURT: Let's put it this way:

2 The Court excluded 78. The Court is not going to
3 change that. And I'm going to tell you something else. For
4 the record, Counsel, this case is not going to rise and fall
5 on Exhibit 78. It's just not going to happen. Or 77 or 76.
6 All right?

7 MS. LEWIS: But I do want to make clear, the
8 Secretary did not make any misrepresentations to the Court
9 regarding what we received.

10 THE COURT: The Court will accept that, and now the
11 Court has resolved the dispute. So we're finished with that.

12 Anything else? Is there any rebuttal evidence?

13 Wait. Hold on.

14 Does the defense rest?

15 MS. RUST: The defense rests, Your Honor.

16 THE COURT: Is there any rebuttal witnesses or
17 evidence?

18 MS. LEWIS: No, Your Honor. I think the evidence is
19 quite robust.

20 THE COURT: All right. Well, I tell you what, then,
21 here's what we're going to do:

22 I want you to check with the courtroom deputy to
23 make sure we have all the exhibits that are supposed to be in
24 this case.

25 And maybe I just need to take a brief recess for you

1 to do that. Do you need time to do that? Are you confident
2 they are all here?

3 Ms. Thompson, do you have everything?

4 THE CLERK: There are some that are marked for
5 identification that I don't have, but I've made arrangements
6 with counsel for them to e-mail them to me.

7 (Pause in the proceedings.)

8 THE COURT: All right. The Court is going to ask
9 that you get with the court reporter to order the transcript.
10 Once the transcript is in your possession, the Court will
11 give you 30 days to provide any supplemental proposed
12 findings of fact or conclusions of law in this case. The
13 Court said 30 days. You've already got a head start.

14 And once the Court receives your proposed findings
15 of fact and conclusions of law, the Court will then review
16 the record and try to "seasonably," the word I use, get out a
17 ruling in this case.

18 It has been the Court's experience that closing
19 argument doesn't really assist the Court as much as your
20 proposed findings of fact and conclusions of law. The
21 traditional page limit, 30 pages, because you've already
22 filed 30 pages, and this is supplemental.

23 Yes, ma'am?

24 MS. LEWIS: Your Honor, the Secretary just had one
25 housekeeping matter, and that was the excerpts that were

1 PX-101, the Pitts deposition, we've made arrangements with
2 Ms. Thompson to get those to her, but I just wanted to, for
3 tracking purposes, et cetera, it's PX-101 that are the Pitts
4 deposition excerpts.

5 THE COURT: All right.

6 MS. LEWIS: Thank you.

7 THE COURT: That's fine.

8 Anything else, Mr. Jewett, Ms. Rust, Mr. Siegrist?

9 MS. RUST: I don't believe so, Your Honor.

10 THE COURT: Okay. Thank you, counsel. If you will
11 make sure that you pick up all extra exhibits and anything
12 you left in here. The Court has a copy of all the exhibits
13 needed in this case. The Court will be in touch.

14 (Proceedings adjourned at 12:01 p.m.)
15

16 CERTIFICATION
17

18 I certify that the foregoing is a correct transcript
19 from the record of proceedings in the above-entitled matter.
20

21
22 _____/s/_____

23 Carol L. Naughton

24 October 4, 2021
25